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8

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11

12 WILLIAM SETZLER,

13 Plaintiff,

14 v.

15 CITY AND COUNTY OF SAN
FRANCISCO, a municipal corporation and
16 DOES ONE through TEN, inclusive

17 Defendants.
18

Case No. 07-CV-05792-EMC

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DISMISS; NOTICE OF
MOTION AND MOTION TO STRIKE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

**DATE: TBD
TIME: TBD
DEPT: TBD**

19 TO: PLAINTIFF AND HIS ATTORNEY OF RECORD:

20 PLEASE TAKE NOTICE that Defendant City and County of San Francisco
21 ("CCSF" or "the City") will and hereby does move the Court for dismissal of the
22 Complaint, and each claim therein, pursuant to Federal Rule of Civil Procedure
23 12(b)(6). In the alternative, the City moves to strike certain portions of the Complaint
24 pursuant to Federal Rule of Civil Procedure 12(f), and for a more definite statement
25 pursuant to Rule 12(e).

26 These motions will be re-noticed after this case is assigned to a United States
27 District Court Judge.
28

1 The City is requesting the Court to take judicial notice of various pleadings and
2 orders in prior cases involving plaintiff William Setzler ("Plaintiff" or "Setzler"). Setzler
3 has previously litigated in State Court various issues involved at the core of the
4 Complaint here, and those prior actions should be accorded *res judicata* effect in this
5 action.

6 Defendant's motion is made on the following grounds (as more fully set forth in
7 the following memorandum of points and authorities):

8 1. The first cause of action (42 U.S.C. § 1983 – Free Speech) should be
9 dismissed because Plaintiff has failed to plead facts sufficient to state a claim and all
10 allegations regarding Plaintiff's alleged disability retirement process and purported
11 accommodations have already been litigated and are not appropriately at issue in this
12 lawsuit;

13 2. The second cause of action (42 U.S.C. § 1983 – Procedural Due
14 Process) should be dismissed because Plaintiff has failed to plead facts sufficient to
15 state a claim, Plaintiff was a probationary employee, and all allegations regarding
16 Plaintiff's alleged disability retirement process and purported accommodations have
17 already been litigated and are not appropriately at issue in this lawsuit;

18 3. The third cause of action (42 U.S.C. § 1983 – Substantive Due Process)
19 should be dismissed because Plaintiff has failed to plead facts sufficient to state a
20 claim, Plaintiff was a probationary employee, and all allegations regarding Plaintiff's
21 alleged disability retirement process and purported accommodations have already
22 been litigated and are not appropriately at issue in this lawsuit;

23 4. The fourth cause of action (Failure to Accommodate, Failure to
24 Participate in the Interactive Process, Retaliation) should be dismissed because
25 Plaintiff has failed to plead facts sufficient to state a claim, Plaintiff was a probationary
26 employee, and all allegations regarding Plaintiff's alleged disability retirement process
27 and purported accommodations have already been litigated and are not appropriately
28 at issue in this lawsuit;

1 5. The fifth cause of action (Breach of Implied Contract), which is a contract-
2 based claim, should be dismissed because in addition to this claim being re-litigated,
3 Setzler's employment was governed by statute, not by contract, and this claim is
4 facially meritless as a matter of law;

5 6. The sixth cause of action (Wrongful Termination) should be dismissed
6 because Plaintiff has failed to plead facts sufficient to state a claim, Plaintiff was a
7 probationary employee, and all allegations regarding Plaintiff's alleged disability
8 retirement process and purported accommodations have already been litigated and are
9 not appropriately at issue in this lawsuit;

10 7. The seventh cause of action (Injunctive Relief) should be dismissed
11 because Plaintiff has failed to plead facts sufficient to state a claim and all allegations
12 regarding Plaintiff's alleged disability retirement process and purported
13 accommodations have already been litigated and are not appropriately at issue in this
14 lawsuit.

15 8. Immaterial and impertinent matters and unsupported claims in the
16 Complaint should be stricken to avoid prejudice, delay and/or confusion, if the motion to
17 dismiss is not granted in its entirety. The matters to be stricken are as follows:

- 18 ▪ ¶¶ 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28,
19 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45,
20 46, 47, 48 and 49 under factual allegations section in their entirety.
- 21 ▪ The text "deliberately interfering with his claim for disability
22 retirement or, in the alternative, his attempts to return to work,
23 accusing his of malingering, and ultimately" from ¶ 52.
- 24 ▪ The text "Plaintiff's denial of accommodation" from ¶ 54.
- 25 ▪ ¶¶ 63, 68 and 69 under the second cause of action in their entirety.
- 26 ▪ The text "withheld, misappropriated, altered and falsified evidence
27 necessary for Plaintiff to prosecute his claim for disability
28 retirement, interfered with his application for disability retirement,
 accused Plaintiff of malingering, denied his accommodation for his
 disability and" from ¶ 65.
- The text "including the maintenance of practices which allow
 Deputy City Attorneys to defeat meritorious claims for disability
 claims through fraud and concealment, and which allow employees
 of the Sheriff's Office to prevent and employee from returning to
 work on an accommodated basis if denied disability retirement and

deny disabled employees through violation of the Civil Service Rules" from ¶ 66.

- ¶¶ 80, 86 and 97 under the third cause of action in their entirety.
- The text "withheld, misappropriated, altered and falsified evidence necessary for Plaintiff to prosecute his claim for disability retirement, interfered with his application for disability retirement, accused Plaintiff of malingering, denied his accommodation for his disability and" from ¶ 82.
- The text "including the maintenance of practices which allow Deputy City Attorneys to defeat meritorious claims for disability claims through fraud and concealment, and which allow employees of the Sheriff's Office to prevent and employee from returning to work on an accommodated basis if denied disability retirement and deny disabled employees through violation of the Civil Service Rules" from ¶ 83.
- The second, third and seventh causes of action in their entirety and all issues in these causes of action that have already been adjudicated in Plaintiff's prior lawsuits against CCSF; and
- The fourth cause of action to the extent it brings claims alleging a failure to accommodate Plaintiff's disabilities or engage in the interactive process with him, and all issues in the fourth cause of action that have already been adjudicated in Plaintiff's prior lawsuits against CCSF.

9. Alternatively, Plaintiff should be ordered to amend his Complaint to make a more definite statement. Given the prior actions, which directly impact his claims here, Plaintiff should at a minimum be required to specifically allege claims that are not barred by the prior actions.

Defendant's motion is based on this notice of motion and motion, the attached memorandum of points and authorities filed in support of this motion, the attached request for judicial notice, all other pleadings and papers in this action, and on any oral argument entertained by the Court during the hearing on this matter.

Dated: January 28, 2008

MEYERS, NAVE, RIBACK, SILVER & WILSON

By /s/ Arthur A. Hartinger
 Arthur A. Hartinger
 Attorneys for Defendant

TABLE OF CONTENTS

	Page No.
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. Summary of the Argument.....	1
II. Summary of the Facts	1
A. Employment History	1
B. Litigation History Related to Disability Issues	2
C. Plaintiff's Most Recent Superior Court Writ Petition	3
D. This Lawsuit	4
III. Legal Argument.....	5
A. Claim Preclusion Bars All of Plaintiff's Claims.....	6
B. Plaintiff Has No Legal or Factual Support for His Fifth Cause of Action alleging that the CCSF Breached the Implied Covenant of Good Faith and Fair Dealing ..	8
C. In the Alternative, Plaintiff's Allegations that are Barred by Res Judicata Should be Stricken from the Complaint	9
1. All Allegations in the Complaint Related to CCSF's Wrongdoing With Respect to Plaintiff's Disability Retirement and Accommodation are Barred by Issue Preclusion (Collateral Estoppel).....	10
2. All Issues Related to Plaintiff's Alleged Property Interest in his Employment Should be Stricken and the Associated Claims Dismissed.....	11
3. CCSF Is Not Liable Under § 1983 for Violation of Plaintiff's Due Process Rights.....	13
4. Setzler's Release From His Probationary Employment is Not Actionable Because it has Been Conclusively Established that Plaintiff was a Malingeringer, Failed to Participate in the City's Accommodation Process, and was not Entitled to Return to Work.....	13
D. Summary of Matters to be Stricken from the Complaint.....	14
E. In the Alternative, Plaintiff Should be Required to Amend his Complaint to Articulate His Claims.....	15
IV. IV. Conclusion	16

TABLE OF AUTHORITIES

CASES

<i>Allied Fire Protection v. Diede Const. Inc.</i> , 127 Cal.App.4th 150 (2005).....	8
<i>Bernhard v. Bank of America Nat. Trust & Savings Ass'n.</i> , 19 Cal.2d 807 (1942).....	7
<i>Border Business Park v. City of San Diego</i> , 142 Cal.App.4th 1538 (2006).....	10
<i>Clegg v. Cult Awareness Network</i> , 18 F.3d 752 (9th Cir. 1994).....	5
<i>Costantini v. Trans World Airlines</i> , 681 F.2d 1199 (9th Cir. 1982).....	7
<i>Derish v. San Mateo – Burlingame Bd. of Realtors</i> , 724 F.2d 1347 (9th Cir. 1983).....	7
<i>Fantasy Inc. v. Fogerty</i> , 984 F.2d 1524 (9th Cir. 1993), <i>rev'd on other grounds</i>	9, 11
<i>Fogerty v. Fantasy, Inc.</i> , 510 U.S. 517 (1994).....	9
<i>Gemtel Corp. v. Community Redevelopment Agency</i> , 23 F.3d 1542 (9th Cir. 1994).....	5
<i>Gregory v. Widnall</i> , 153 F.3d 1071 (9th Cir. 1998).....	7
<i>Hamilton v. Asbestos Corp. Ltd.</i> , 22 Cal.4th 1127 (2000).....	8
<i>In re Delorean Motor Co.</i> , 991 F.2d 1236 (6th Cir. 1993).....	13
<i>In re VeriFone Litigation</i> , 11 F.3d 865 (9th Cir. 1993).....	5
<i>Ivey v. Board of Regents</i> , 673 F.2d 266 (9th Cir. 1982).....	15
<i>Jensen v. Wells Fargo</i> , 85 Cal.App.4 th 285 (2000).....	13

1	<i>Lee v. City of Los Angeles,</i>	
2	250 F.3d 668 (9th Cir. 2001).....	6
3	<i>Lucido v. Superior Court,</i>	
4	51 Cal.3d 335 (1990).....	10
5	<i>Maldonado v. Harris,</i>	
6	370 F.3d 945 (9th Circuit 2004).....	8
7	<i>Markman v. County of Los Angeles,</i>	
8	35 Cal.App.3d 132 (1973).....	9
9	<i>McHenry v. Renne,</i>	
10	84 F.3d 1172 (9th Cir. 1992).....	15
11	<i>Miller v. State of California,</i>	
12	18 Cal.3d 808 (1977).....	9
13	<i>Monell v. Dep't of Soc. Servs.,</i>	
14	436 U.S. 658 (1978).....	13
15	<i>Monterey Plaza Hotel Limited Partnership v. Local 483 of Hotel Employees,</i>	
16	215 F.3d 923 (9th Cir. 2000).....	8
17	<i>Mpoyo v. Litton Electro-Optical Systems,</i>	
18	430 F.3d 985 (9th Cir. 2005).....	7
19	<i>Neveu v. City of Fresno,</i>	
20	392 F.Supp.2d 1159 (E.D. Cal. 2005).....	13
21	<i>Owens v. Kaiser Foundation Health Plan, Inc.,</i>	
22	244 F.3d 708 (9th Cir. 2001).....	7
23	<i>Portman v. County of Santa Clara,</i>	
24	995 F.2d 898 (9th Cir. 1993).....	12
25	<i>Rael v. Taylor,</i>	
26	832 P.2d 1011 (Colo.App.1991).....	7
27	<i>Roley v. Pierce County Fire Protection Dist.</i>	
28	No. 4, 869 F.2d 491 (9th Cir. 1989).....	12
	<i>Shaver v. F.W. Woolworth Co.,</i>	
	840 F.2d 1361 (7th Circuit 1988).....	7
	<i>Sherman v. Yaki,</i>	
	549 F.2d 1287 (9th Cir. 1977).....	15

1	<i>Shoemaker v. Myers,</i>	
2	52 Cal.3d 1 (1990).....	9
3	<i>Syversen v. International Business Machines Corp.,</i>	
4	472 F.3d 1072 (9th Cir. 2007).....	10
5	<i>Thompson v. City of Shasta Lake,</i>	
6	314 F.Supp.2d 1017 (E.D. Cal. 2004).....	5
7	<i>Van Pool v. City and County of San Francisco,</i>	
8	752 F.Supp. 915 (N.D. Cal 1990).....	10
9	STATUTES	
10	42 U.S.C. Section 1983	Passim
11	Code of Civil Procedure Section 1094.5	2-4
12	Labor Code Section 4850.....	2
13	OTHER AUTHORITIES	
14	Federal Rules of Civil Procedure 12(b)(6)	5
15	Federal Rules of Civil Procedure 12(e).....	15
16	Federal Rule of Civil Procedure 12(f).....	9

MEMORANDUM OF POINTS AND AUTHORITIES

I. Summary of the Argument

Plaintiff is a former probationary deputy sheriff for the City. This lawsuit comes to the Court on the heels of multiple prior lawsuits by Plaintiff against the City alleging the same wrongful acts that Plaintiff is using as his basis for the instant lawsuit. Despite receiving unfavorable rulings in all of his prior lawsuits, Plaintiff has filed this lawsuit seeking yet another bite at the apple.

All of Plaintiff's claims and allegations in the Complaint that stem from the prior actions are improper and should be dismissed or stricken from the Complaint. This includes, without limitation, all issues that have been adjudicated on their merits in Plaintiff's prior lawsuits against the CCSF, all claims that arise from the same nucleus of operative facts used as the basis for the prior lawsuits, and Plaintiff's breach of contract claim which cannot be brought against a public employer. Accordingly, Defendant CCSF respectfully requests that its motion to dismiss is granted in its entirety.

II. Summary of the Facts

A. Employment History

Plaintiff joined the San Francisco Sheriff's Department as a probationary deputy sheriff in May 1989. See Exhibit A to Request for Judicial Notice at p. 2:6-7.; See Also Exhibits B and C to Request for Judicial Notice.)¹ On January 2, 1990, seven months into his probationary period, Plaintiff encountered a jail gate that would not open. (Exhibit A to Request for Judicial Notice at p. 2:10-12.) Plaintiff kicked the gate with his left foot. (*Id.*) Later during his shift, Plaintiff reported that his foot hurt. (*Id.* at p. 2:13.)

Claiming to have injured his foot so severely that he could not return to work as a deputy sheriff, Plaintiff sought to retire with a full disability pension. (*Id.* at p. 2:14-

¹ These matters were previously determined by the San Francisco Superior Court on April 25, 2006, when it rendered its judgment denying plaintiff's writ of mandamus seeking reinstatement as a deputy sheriff. A copy of the Court's statement of decision, judgment, and notice of judgment are attached as Exhibits A, B and C to the City's request for judicial notice.

16.) Plaintiff remained employed by the City after January 2, 1990, staying on leave for over 15 years. (*Id.* at p. 2:20-21.) He received full disability pay under Labor Code section 4850 between January 1990 and January 1991, and maintained his full pay through a combination of workers' compensation benefits, sick leave, vacation pay, and vocational rehabilitation allowances until at least March 1996. (*Id.* at p. 2:21-24.) And during Plaintiff's entire 15-year leave of absence, he continued to receive his employee benefits, such as his City-paid health insurance benefits. (*Id.* at p. 25-27.)

Although the City does not have permanent modified duty positions for deputy sheriffs, the City repeatedly offered Plaintiff three ways to return to work: (1) return to full duty as a deputy sheriff if he was medically capable of performing the job's essential functions; (2) return to full duty as a deputy sheriff with reasonable accommodations that would allow him to perform the job's essential functions; or (3) transfer to another position under the City's disability transfer program. (*Id.* at p. 3:1-6.) While consistently maintaining that he cannot return to full duty as a sheriff, Plaintiff has also declined to participate in the City's accommodation process, under which he could return to work with as a deputy sheriff with reasonable accommodations or obtain a disability transfer to a new position. (*Id.* at p. 3:8-12.) The City also provided Plaintiff with vocational rehabilitation to become a computer technician through its workers' compensation system. (*Id.* at p. 3:13-14.) Plaintiff was released from his probationary employment with the City on November 1, 2006. (Complaint at ¶ 50.)

B. Litigation History Related to Disability Issues

In 1994, a state administrative law judge ("ALJ") conducted a hearing on Plaintiff's disability retirement application. The ALJ denied the application. (*Id.* at p. 4:6-8.) On July 11, 1996, Plaintiff filed his initial writ petition pursuant to California Code of Civil Procedure section 1094.5. (*Id.* at p. 4:23-25.) Plaintiff's initial writ petition asked the Superior Court to overturn the retirement board's denial of his disability retirement application. (*Id.*) Following a three-day trial before California Superior Court

1 Judge William Cahill, the Court denied Plaintiff's initial writ petition. (*Id.* at p. 5:1-2.)
2 Plaintiff appealed the decision. (*Id.*) Before the appeal was heard, the parties found
3 that a videotape that a deputy city attorney lodged with the Court was not an accurate
4 copy of the videotape entered into evidence in the administrative hearing. (*Id.* at p. 5:3-
5 5.) The matter was remanded to the ALJ and retirement board to authenticate the
6 actual videotape and reconsider Plaintiff's disability retirement application. On remand,
7 the ALJ authenticated the videotape and the retirement board affirmed its denial of
8 plaintiff's application. (*Id.* at p. 5:5-8.)

9 The proceedings on the initial writ petition returned to the Superior Court, and
10 Judge Raymond Williamson again denied the writ. (*Id.* at p. 5:9-12.) In its decision on
11 August 25, 1998, the Court held that the evidence failed to establish that petitioner
12 made a good faith effort to return to work and that Plaintiff's claims about his alleged
13 disability were without merit. (*Id.* at p. 5:12-17.)

14 Plaintiff moved for a new trial. (*Id.* at p. 5:20.) The Honorable David Garcia of
15 the California Superior Court heard the new trial motion. (*Id.* at p. 5:22.) Judge Garcia
16 denied Plaintiff's motion and concluded that Plaintiff was a malingerer who had not
17 made a good faith effort to return to work. (*Id.* at p. 5:23-6:3.) Plaintiff next appealed
18 the denial of his writ. (*Id.* at p. 6:4-5.) In an unpublished decision on April 12, 2000, the
19 California Court of Appeal upheld the denial of Plaintiff's writ petition. In reaching this
20 decision, the Court of Appeal specifically affirmed the Superior Court's findings that
21 Plaintiff's claims about his alleged disability were not credible and that Plaintiff had not
22 made a good faith effort to return to work. (*Id.* at p. 6:7-10.) When the Court of Appeal
23 remitted its opinion to the Court on June 13, 2000, the judgment on the first writ petition
24 became final. (*Id.* at p. 6:10-11.)

25 **C. Plaintiff's Most Recent Superior Court Writ Petition**

26 On July 19, 2000, the month after the judgment denying the first petition became
27 final, Plaintiff filed a second writ petition in San Francisco Superior Court. (*Id.* at p.
28 6:20-22.) In the second petition Plaintiff sought a writ of mandate that would order the

1 City to return him to work as deputy sheriff with back pay and monetary relief dating
 2 back to 1991. (*Id.* at p. 6:22-24.) On September 5, 2000, CCSF filed its response to
 3 the second writ. (*Id.* at p. 6:25.) On June 3, 2005 — almost five years after the petition
 4 was filed — Plaintiff filed a motion asking the Court to grant the second petition. (*Id.* at
 5 p. 6:25-27.)

6 In his second writ petition Plaintiff contended that CCSF fraudulently concealed
 7 evidence from him during the earlier writ action. (*Id.* at pg.17:3-11.) In response to this
 8 contention, the Court held that the information allegedly concealed “would have been
 9 discovered had [Plaintiff] diligently investigated his case in the earlier proceeding” and
 10 that Plaintiff cannot avoid the preclusive effects of the earlier judgment on his disability
 11 retirement application even if, as he contends, “the City had improperly or fraudulently
 12 concealed this evidence in the earlier proceeding.” (*Id.* at p. 17:5-11.) Moreover, the
 13 Court noted that Plaintiff was a probationary employee that did not have a vested right
 14 to continued employment with the City. (*Id.* at p. 18:19-21.) The Court also found that
 15 Plaintiff deliberately chose not to engage in the disability accommodation process and
 16 failed to make a good faith effort to return to work. (*Id.* at p. 20:4-12.) In fact, the Court
 17 noted that Plaintiff treated the return to work process as a “cat and mouse game” by
 18 randomly appearing at the Sheriff’s Department while ducking the City’s efforts to
 19 return him to work. (*Id.* at p. 24:2-4.) On February 28, 2006, the Court denied
 20 Plaintiff’s second writ application. (See Statement of Decision, Attached as Exhibit A to
 21 the Request for Judicial Notice.) Judgment was entered on April 25, 2006. (See
 22 Exhibit B_ to the Request for Judicial Notice.) Because Plaintiff did not appeal the
 23 judgment on the second writ, it has become final. California Rule of Court 8:104.

24 **D. This Lawsuit**

25 Plaintiff has now filed the instant lawsuit seeking further legal recourse based on
 26 the issues adjudicated in his prior lawsuits against CCSF. The following are Plaintiff’s
 27 seven causes of action plead against CCSF in the Complaint:

- 28 1) Violation of Federal Civil Rights (42 U.S.C. Section 1983) – Free

1 Speech;

2 2) Violation of Federal Civil Rights (42 U.S.C. Section 1983) –

3 Procedural Due Process;

4 3) Violation of Federal Civil Rights (42 U.S.C. Section 1983) –

5 Substantive Due Process;

6 4) Failure to Accommodate, Failure to Participate in Interactive Process,
7 Retaliation;

8 5) Breach of Implied Contract;

9 6) Wrongful Termination in Violation of Public Policy; and

10 7) Injunctive Relief.

11 III. Legal Argument

12 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is
13 appropriate where a plaintiff cannot state a set of facts in support of the claim that
14 would entitle him or her to relief. *Gemtel Corp. v. Community Redevelopment Agency*,
15 23 F.3d 1542, 1546 (9th Cir. 1994). While all allegations in the complaint are to be
16 taken as true and considered in the light most favorable to the moving party, a court is
17 not required to accept legal conclusions cast in the form of factual allegations if those
18 conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult*
19 *Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. 1994). "Conclusory allegations of
20 law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure
21 to state a claim." *In re VeriFone Litigation*, 11 F.3d 865, 868 (9th Cir. 1993). "[I]t is not
22 proper for the court to assume 'that [plaintiff] can prove facts which [he or she] has not
23 alleged or that the defendants has violated the . . . laws in ways that have not been
24 alleged.'" *Thompson v. City of Shasta Lake*, 314 F.Supp.2d 1017, 1022 (E.D. Cal.
25 2004) quoting *Associated General Contractors of California, Inc. v. California State*
26 *Council of Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897 (1983).

27 In considering the motion, the Court may take into consideration matters subject
28 to judicial notice, and also documents or other matters referred to in the complaint

1 where there is do dispute about the authenticity. *Lee v. City of Los Angeles*, 250 F.3d
2 668, 688 (9th Cir. 2001).

3 **A. Claim Preclusion Bars All of Plaintiff's Claims**

4 Plaintiff's seven causes of action in this lawsuit are based on his allegation that
5 CCSF (1) withheld and concealed information during his application process for a
6 disability retirement; (2) failed to engage in the interactive process and accommodate
7 his alleged disability; and (3) wrongfully denied him the opportunity to work as a deputy
8 sheriff. (Complaint at ¶¶ 12, 20, 23, 34, 54, 65, 82, 83, 95, 96, 111 and 117.)

9 However, as further described above, Plaintiff and CCSF have extensively litigated
10 Plaintiff's disability issues and entitlement to work as a deputy sheriff at CCSF. (See
11 Exhibit A_ to the Request for Judicial Notice at pp. 1:7-19, 3:8-12, 5:12-6:10, 17:5-11,
12 19:16-21, 20:4-12 and 23:19-24:1.). In fact, in Plaintiff's most recent writ action, the
13 Court held that Plaintiff was not entitled to be reinstated as a deputy sheriff, that he
14 failed to make a good faith effort to return to work, that he declined to participate in the
15 disability accommodation process, that his claims about his alleged disability were not
16 credible and that he has made false claims about his foot injury. (*Id.*) The Court also
17 held that the information which Plaintiff alleges that CCSF concealed during his
18 disability retirement process "would have been discovered had [Plaintiff] diligently
19 investigated his case in the earlier proceeding" and that Plaintiff cannot avoid the
20 preclusive effects of the earlier judgment on his disability retirement application even if,
21 as he contends, "the City had improperly or fraudulently concealed this evidence in the
22 earlier proceeding." (*Id.* at p. 17:5-11.) Despite this ruling, Plaintiff has filed the instant
23 lawsuit based on the same allegations in his prior lawsuits. Because Plaintiff's claims
24 in this lawsuit arise from the same nucleus of operative facts as his prior lawsuits
25 against CCSF, he is foreclosed from re-asserting these claims against CCSF.

26 Claim preclusion bars the relitigation of an entire claim when: (1) the claim is
27 identical to the one presented in the prior proceedings; (2) the prior proceeding resulted
28 in final judgment on the merits; and (3) preclusion is being asserted against a party in

1 the prior proceeding. *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 987 (9th
 2 Cir. 2005); *Bernhard v. Bank of America Nat. Trust & Savings Ass'n.*, 19 Cal.2d 807,
 3 813 (1942).

4 Federal Courts utilize a transition analysis; i.e., two suits constitute a single
 5 cause of action if they both arise from the same "transactional nucleus of facts" (see
 6 *Derish v. San Mateo – Burlingame Bd. of Realtors*, 724 F.2d 1347 at 1349 (9th Cir.
 7 1983)) or a single "core of operative facts" (see *Shaver v. F.W. Woolworth Co.*, 840
 8 F.2d 1361 at 1365 (7th Circuit 1988)). The Ninth Circuit recently found in *Owens v.*
 9 *Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708 at 713 (9th Cir. 2001) that "res
 10 judicata, also known as claims preclusion, . . . is applicable whenever there is (1) an
 11 identity of claims, (2) a final judgment on the merits, and (3) identity or privity between
 12 the parties." (Internal citations omitted.) The central criterion in determining whether
 13 there is an identity of claims between the first and second adjudications is whether the
 14 two suits arise out of the same transactional nucleus of facts.

15 In *Owens*, the plaintiff filed a claim for wrongful termination which was
 16 dismissed. He then filed a second action that alleged Title VII claims of discriminatory
 17 termination, hostile work environment and wrongful retaliation, which he contended
 18 were "distinctly different" and "not the subject of the prior action." The Court held that
 19 the allegations of both complaints arose from the same transactional nucleus of facts
 20 and were all grounds for recovery which could have been asserted in a prior suit
 21 between the same parties, and the new claims were barred by claims preclusion.

22 The doctrine of claims preclusion bars all grounds for recovery which could have
 23 been asserted, whether they were or not, in a prior suit between the same parties and
 24 the same causes of action. *Costantini v. Trans World Airlines*, 681 F.2d 1199 at 1201
 25 (9th Cir. 1982). Further, claim preclusion is an absolute bar "not only as to matters
 26 actually litigated but also to every matter which might have been litigated in the prior
 27 action." *Rael v. Taylor*, 832 P.2d 1011 at 1013 (Colo.App.1991); *Gregory v. Widnall*,
 28 153 F.3d 1071 at 1074 (9th Cir. 1998) (res judicata barred second action wherein

1 Plaintiff claimed he was subject to a hostile work environment based on the same facts
 2 pled in an earlier dismissed action for discrimination on the basis of race, sex and
 3 retaliation for making complaints). Res judicata "operates to bar any claims that could
 4 have been raised, not just those that actually were made." *Monterey Plaza Hotel*
 5 *Limited Partnership v. Local 483 of Hotel Employees*, 215 F.3d 923 at 928 (9th Cir.
 6 2000).

7 It is also worth noting that California law is in accord with this analysis.
 8 Specifically, California law requires that "all claims based on the same cause of action
 9 must be decided in a single suit." *Allied Fire Protection v. Diede Const. Inc.*, 127
 10 Cal.App.4th 150 at 154 (2005). Further, two claims are based on the same cause of
 11 action if both seek to vindicate the same "primary right." *Maldonado v. Harris*, 370 F.3d
 12 945 at 952 (9th Circuit 2004). A cause of action is comprised of a primary right of a
 13 plaintiff, a corresponding primary duty of a defendant and a wrongful action by the
 14 defendant constituting a breach of that duty. As far as the content is concerned, the
 15 primary right is simply the Plaintiff's right to be free from the particular injury suffered.
 16 *Id.* A plaintiff cannot "split" a cause of action into successive suits in an effort to
 17 attempt double recovery. *Hamilton v. Asbestos Corp. Ltd.*, 22 Cal.4th 1127 at 1145
 18 (2000).

19 Plaintiff has already brought claims in his prior litigation asserting that CCSF
 20 failed to accommodate his alleged disability, failed to grant him a disability retirement
 21 and failed to reinstate him as a deputy sheriff. Plaintiff now seeks a second bite at the
 22 apple by asserting that CCSF unlawfully failed to accommodate his alleged disability
 23 and allow him to work as a deputy sheriff. Because these claims seek to enforce
 24 primary rights that were already conclusively litigated in Plaintiff's prior lawsuits against
 25 CCSF, they should be dismissed and stricken from the instant lawsuit.

26 **B. Plaintiff Has No Legal or Factual Support for His Fifth Cause of**
 27 **Action alleging that the CCSF Breached the Implied Covenant of**
 28 **Good Faith and Fair Dealing**

Plaintiff's fifth cause of action alleges that CCSF breached an implied

employment contract that allegedly existed in CCSF's civil service rules. (Complaint at ¶¶ 102-105.) In California, the terms and conditions of public employment are generally determined by statute, not by contract. *Miller v. State of California*, 18 Cal.3d 808, 813-814, (1977). "One who accepts such [public] employment, thereby benefiting in ways denied an employee of a private employer, must in turn relinquish certain rights which are enjoyed by private employees." *Markman v. County of Los Angeles*, 35 Cal.App.3d 132, 134-135 (1973), citing *City of San Diego v. American Federation of State etc. Employees*, 8 Cal.App.3d 308, 312-313 (1970). Thus, any remedy for a violation of the terms and conditions of public employment "is confined to those remedies provided by statute or ordinance." *Id.*; *Shoemaker v. Myers*, 52 Cal.3d 1, 23-24 (1990) (indicating that implied covenant of good faith causes action cannot be brought based on alleged public employment contracts). Because Plaintiff was a public employee when he was employed by CCSF, he is foreclosed from bringing a breach of contract claim based on his former employment with CCSF. (Complaint at ¶ 2.) Accordingly, Plaintiff's fifth cause of action should be dismissed without leave to amend.

C. In the Alternative, Plaintiff's Allegations that are Barred by Res Judicata Should be Stricken from the Complaint

Before responding to a pleading, a party may move to strike from a pleading any "redundant, immaterial, impertinent or scandalous matter," including single words or phrases. Fed. R. Civ. Pro. 12(f); See *Fantasy Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds in Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534-535 (1994). Allegations that have already been adjudicated in a different forum may be stricken from a pleading pursuant to Rule 12(f). *Fantasy Inc., supra*, 984 F.2d at 1527. In this case, Plaintiff's Complaint is riddled with immaterial and impertinent allegations that have already been adjudicated in multiple prior lawsuits involving the same parties. Accordingly, this Court should strike the issues and claims from the Complaint that

1 have already been judicially determined during the extensive litigation history between
2 the parties.

3 **1. All Allegations in the Complaint Related to CCSF's**
4 **Wrongdoing With Respect to Plaintiff's Disability Retirement**
5 **and Accommodation are Barred by Issue Preclusion**
6 **(Collateral Estoppel).**

7 The doctrine of issue preclusion bars Plaintiff from relitigating issues that were
8 already determined in prior court actions. Issue preclusion applies when: (1) the issue
9 is identical to the one decided in the prior proceeding; (2) the issue was actually
10 litigated in the prior proceeding; (3) the issue was necessarily decided in the prior
11 proceeding; (4) the prior decision is final and on the merits; and (5) preclusion is sought
12 against the person who was a party in the prior proceeding. *Van Pool v. City and*
13 *County of San Francisco*, 752 F.Supp. 915, 921 (N.D. Cal 1990) ; *Lucido v. Superior*
14 *Court*, 51 Cal.3d 335, 341 (1990); *Syverson v. International Business Machines Corp.*,
15 472 F.3d 1072, 1079 (9th Cir. 2007).

16 In Plaintiff's prior litigation against the City, the following issues—which are
17 raised in the instant litigation as supporting plaintiff's claims against CCSF—were
18 adjudicated on their merits: (1) the alleged concealment of evidence supportive of
19 Plaintiff's disability retirement application; (2) the alleged failure to accommodate his
20 disabilities; (3) whether Plaintiff was eligible for a disability retirement; (4) whether
21 Plaintiff made a good faith effort to return to work; (5) whether Plaintiff failed to
22 participate in the accommodation process; (6) whether plaintiff is a malinger; and (7)
23 whether plaintiff was entitled to be reinstated. (See Exhibit A to the Request for
24 Judicial Notice at pp. 3:8-12, 5:12-6:10, 17:5-11 and 20:4-12.) Because Plaintiff has
25 already had his day in Court with respect to these issues, he cannot use them as a
26 basis for his claims in the instant lawsuit. *Border Business Park v. City of San Diego*,
27 142 Cal.App.4th 1538, 1564-1566 (2006). Accordingly, all such allegations should be
28 stricken from the Complaint and the claims that rely on these allegations dismissed.

"The function of a 12(f) motion to strike is to avoid the expenditure of time and
money that must arise from litigating spurious issues by dispensing with those issues

1 prior to trial. Immaterial matter is that which has no essential or important relationship
 2 to the claim for relief or defenses being pleaded. Impertinent matter consists of
 3 statements that do not pertain, and are not necessary, to the issues in question.
 4 Superfluous historical allegations are a proper subject of a motion to strike." *Fantasy*,
 5 *supra.*, 984 F.3d at 1527. Allegations that consist of stale and barred charges that
 6 have already been extensively litigated are subject to a motion to strike because they
 7 create a serious risk of prejudice, delay and confusion of the issues. *Id.* at 1528.

8 Plaintiff's substantive allegations in the Complaint involve issues that have been
 9 rehashed from Plaintiff's multiple prior legal actions against CCSF. All of these
 10 allegations must be stricken from the Complaint because they create a serious risk of
 11 prejudice, delay and confusion of the issues. Moreover, CCSF has expended
 12 significant resources litigating these issues in prior lawsuits, and should not be required
 13 to expend further resources in discovery addressing issues that have already been
 14 judicially determined.

15 **2. All Issues Related to Plaintiff's Alleged Property Interest in his**
 16 **Employment Should be Stricken and the Associated Claims**
Dismissed.

17 Plaintiff's second and third causes of action, which allege a denial of procedural
 18 and substantive due process pursuant to 42 U.S.C. § 1983, are premised on Plaintiff
 19 having a property interest in his employment. (See Complaint at ¶¶ 62 and 79.) During
 20 Plaintiff's recent writ action the Court determined that he was a probationary employee.
 21 (See Exhibit A to the Request for Judicial Notice at p. 18:19-21.) CCSF's civil service
 22 rules do not provide probationary employees with a property interest in their
 23 employment. (See Exhibit E to the Request for Judicial Notice at Section 117.9.1(1).)
 24 ("An employee may be released by the appointing officer at any time during the
 25 probationary period upon written notice to the employee and the Human Resources
 26 Director.") Furthermore, the MOU that governed Plaintiff's employment with CCSF
 27 indicated that only non-probationary employees were entitled to due process rights.
 28 (See Exhibit D to the Request for Judicial Notice at appendices A-1 and A-3) ("No

1 permanent, non-probationary employee shall be disciplined, or subject to punitive
2 action except for just cause" **Note:** None of these procedures applies to
3 terminations of probationary or provisional employees.) Accordingly, all allegations in
4 the Complaint alleging that Plaintiff had a property interest in his employment with
5 CCSF must be stricken.

6 Because Plaintiff did not have a property interest in his employment with CCSF,
7 Plaintiff's second and third causes of action alleging due process violations pursuant to
8 42 U.S.C. § 1983 are without merit. The Ninth Circuit Court of Appeals has held that "at
9 a minimum" the elements of a § 1983 claim based on a violation of due process are:
10 "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the
11 interest by the government; and (3) lack of process." *Portman v. County of Santa Clara*,
12 995 F.2d 898, 904 (9th Cir. 1993). Here, Plaintiff has failed to allege facts which would
13 establish that he had a property or liberty interest in his job, and the alleged facts (and
14 those that can be judicially noticed) establish that he did not have a property or liberty
15 interest in his job. (See Exhibit A to the Request for Judicial Notice at p. 18:19-21,
16 holding that Plaintiff's employment with CCSF was probationary). Therefore Plaintiff is
17 unable to establish a *prima facie* case of violation of due process.

18 Plaintiff also cannot establish that his "liberty interest" was infringed by
19 Defendant CCSF. A public agency's accusations against an employee do not implicate
20 a constitutional liberty interest unless they seriously damage his community standing
21 and associations or foreclose his freedom to pursue other employment. *Roley v.*
22 *Pierce County Fire Protection Dist. No. 4*, 869 F.2d 491, 495 (9th Cir. 1989). However,
23 Plaintiff states he was terminated on the "basis that he had failed to complete
24 probation." (Complaint at ¶ 50.) Such an allegation does not seriously damage
25 Plaintiff's community standing and associations or foreclose his freedom to pursue
26 other employment. Accordingly, Plaintiff's second and third causes of action should be
27 dismissed without leave to amend.
28

1 **3. CCSF Is Not Liable Under § 1983 for Violation of Plaintiff's**
 2 **Due Process Rights.**

3 Local governments can only be sued under § 1983 where the claims arise out of
 4 unconstitutional actions by their employees who implement or execute a "policy
 5 statement, ordinance, or decision officially adopted and promulgated by that body's
 6 officers" *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-1 (1978). In other
 7 words, a municipality cannot be held liable for an employee's actions outside the scope
 8 of implementation of the policies or customs on a *respondeat superior* theory. *Id.*

9 Here, Plaintiff has not identified any specific official CCSF policy, custom or
 10 practice which resulted in a violation of his constitutional due process rights. Rather,
 11 Plaintiff has alleged in a conclusory manner that he had a property interest in his
 12 employment and that CCSF's actions in removing this interest were taken according to
 13 official policy, custom or practice. *In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th
 14 Cir. 1993) (holding that the court need not accept as true for purposes of a 12(b)(6)
 15 motion unreasonable inferences or unwarranted deductions of fact). Therefore, Plaintiff
 16 does not state a claim against CCSF under § 1983. *Neveu v. City of Fresno*, 392
 17 F.Supp.2d 1159, 1178-79 (E.D. Cal. 2005).

18 **4. Setzler's Release From His Probationary Employment is Not**
 19 **Actionable Because it has Been Conclusively Established that**
 20 **Plaintiff was a Malingerer, Failed to Participate in the City's**
 21 **Accommodation Process, and was not Entitled to Return to**
 22 **Work**

23 As thoroughly described above, it has been conclusively established that Plaintiff
 24 was a malingerer, that he failed and refused to participate in the City's accommodation
 25 process, and that he is not entitled to be returned to work as a deputy sheriff. An
 26 employer can not be held liable for separating an employee where, as here, the
 27 employee has declined to participate in the reasonable accommodation process. See,
 28 *e.g., Jensen v. Wells Fargo*, 85 Cal.App.4th 285, 263 (2000). Because Plaintiff had no
 reinstatement rights and refused to participate in the City's accommodation process, he
 is foreclosed from bringing any legal action based on his release from his probationary

employment with the City.

D. Summary of Matters to be Stricken from the Complaint

- ¶¶ 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49 under factual allegations section in their entirety.
- The text “deliberately interfering with his claim for disability retirement or, in the alternative, his attempts to return to work, accusing his of malingering, and ultimately” from ¶ 52.
- The text “Plaintiff’s denial of accommodation” from ¶ 54.
- ¶¶ 63, 68 and 69 under the second cause of action in their entirety.
- The text “withheld, misappropriated, altered and falsified evidence necessary for Plaintiff to prosecute his claim for disability retirement, interfered with his application for disability retirement, accused Plaintiff of malingering, denied his accommodation for his disability and” from ¶ 65.
- The text “including the maintenance of practices which allow Deputy City Attorneys to defeat meritorious claims for disability claims through fraud and concealment, and which allow employees of the Sheriff’s Office to prevent and employee from returning to work on an accommodated basis if denied disability retirement and deny disabled employees through violation of the Civil Service Rules” from ¶ 66.
- ¶¶ 80, 86 and 97 under the third cause of action in their entirety.
- The text “withheld, misappropriated, altered and falsified evidence necessary for Plaintiff to prosecute his claim for disability retirement, interfered with his application for disability retirement, accused Plaintiff of malingering, denied his accommodation for his disability and” from ¶ 82.

- The text “including the maintenance of practices which allow Deputy City Attorneys to defeat meritorious claims for disability claims through fraud and concealment, and which allow employees of the Sheriff’s Office to prevent and employee from returning to work on an accommodated basis if denied disability retirement and deny disabled employees through violation of the Civil Service Rules” from ¶ 83.
- The second, third and seventh causes of action in their entirety and all issues in these causes of action that have already been adjudicated in Plaintiff’s prior lawsuits against CCSF; and
- The fourth cause of action to the extent it brings claims alleging a failure to accommodate Plaintiff’s disabilities or engage in the interactive process with him, and all issues in the fourth cause of action that have already been adjudicated in Plaintiff’s prior lawsuits against CCSF.

E. In the Alternative, Plaintiff Should be Required to Amend his Complaint to Articulate His Claims

Plaintiff’s motion should be dismissed in its entirety. Alternatively, and at a minimum, should grant the City motion for a more definite statement. The fair notice pleading standard for civil complaints calls for inclusion of clear, factual allegations in support of each cause of action. *Ivey v. Board of Regents*, 673 F.2d 266 (9th Cir. 1982); *Sherman v. Yaki*, 549 F.2d 1287, 1290 (9th Cir. 1977). Under Rule 12(e), “if a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.” Fed R. Civ. P. 12(e). At bare minimum a complaint must set forth the theory of the case “with enough detail to guide discovery.” *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1992).

1 As further described above, Plaintiff's Complaint in this lawsuit relies extensively
2 on claims and issues that have already been adjudicated between the parties. This
3 creates an inherent uncertainty in that it does not appear any legitimate claims exist
4 that have not already been adjudicated in Setzler's prior lawsuits. Accordingly, at a
5 minimum, Plaintiff should be required to file an amended pleading that clearly identifies
6 any new allegations from those issues which have already been the subject of prior and
7 binding litigation outcomes.

8 IV. IV. Conclusion

9 For the reasons set forth above, the City respectfully requests that its motion to
10 dismiss be granted in its entirety. Alternatively, if the motion to dismiss is not granted in
11 its entirety, Defendant requests that its motion to strike is granted and that this Court
12 issue an order precluding Plaintiff from relitigating claims and issues that have already
13 been determined during the extensive litigation history between the parties. Finally,
14 and as another alternative motion, Defendant requests that Plaintiff be required to
15 amend his Complaint to provide more certainty regarding the allegations that are issue
16 in this lawsuit if Defendant's motion to dismiss is not granted.

17 DATED: January 28, 2008 MEYERS, NAVE, RIBACK, SILVER & WILSON

18
19 By: /s/ Arthur A. Hartinger
20 Arthur A. Hartinger
21 Attorneys for Defendant
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